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No. 78-1919

In The Supreme Court of the United States

OCTOBER TERM, 1978

BERNARDO MORENO DAVILA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 592 F.2d 1261.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1979. A petition for rehearing was denied on May 24, 1979 (Pet. App. A5). The petition for a writ of certiorari was filed on June 26, 1979, and is therefore

out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the wiring of money orders that are sent and received within the same state but are always routed through another state constitutes a transmission in interstate commerce sufficient to confer federal jurisdiction under the wire fraud statute, 18 U.S.C. 1343.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on 50 counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1–A4).

The facts, which are not in dispute, are summarized in the opinion of the court of appeals (Pet. App. A2). Petitioner operated a produce business in San Antonio, Texas. He was acquainted with Alexander Tarasuk, who ran a financial enterprise in the same building and acted as a contract agent for Western Union. When Tarasuk wired money, he was required by Western Union regulations to receive prepayment before doing so. However, Western Union allowed Tarasuk a grace period of a week to ten days to remit the payments. Tarasuk used this grace period as a way of making short-term loans; he would wire money without prepayment as long as the customer paid him within the 7–10 day period. Tarasuk sometimes received a fee from his customers for providing this service (Pet. App. A2).

When petitioner decided to expand his produce business in the Rio Grande Valley, he needed a line of credit and he began to make extensive use of Tarasuk's service. He asked Tarasuk to wire money orders to him, sometimes in the names of other members of his family. As the amounts grew, to as high as $152,000 in April 1974, Tarasuk began to have difficulty paying Western Union on time. To solve this problem, petitioner opened a bank account in McAllen, where he would deposit some of the wired money orders and then ask the McAllen bank to make a bank-to-bank wire transfer to Tarasuk's San Antonio account. In time, this "kiting" scheme of paying off old debts to Western Union with new Western Union funds ended, leaving Western Union short almost $68,000 (Pet. App. A2).

ARGUMENT

Although the wired money orders in this case were sent and received within the same state, all Western Union wire money transfers are routed through a computer terminal in Middletown, Virginia. This interstate component of the transmission was used as the basis for federal jurisdiction under 18 U.S.C. 1343, which prohibits the use of "wire, radio, or television communications in interstate or foreign commerce" for the purpose of executing any scheme to defraud. Petitioner contends that the interstate routing of the wire transmissions was purely incidental to an essentially intrastate communication and that this incidental interstate involvement in no way furthered the fraudulent scheme and therefore cannot create federal jurisdiction over the offense (Pet. 4–9).

1. It is sufficient for proving the interstate aspect of a wire fraud prosecution to show a very minimal use of some form of interstate communication. Once a scheme to defraud has been established, proof that one interstate telephone call or other wire communication was

made as part of the scheme will suffice to establish federal jurisdiction under 18 U.S.C. 1343. *United States* v. *Wise*, 553 F.2d 1173, 1174 (8th Cir. 1977); *Weisser* v. *Ciccone*, 532 F.2d 101, 104 n.6 (8th Cir. 1976); *United States* v. *Jackson*, 451 F.2d 281, 283–284 (5th Cir. 1971), cert. denied, 405 U.S. 928 (1972); see also *United States* v. *Aloi*, 511 F.2d 585, 599 (2d Cir. 1975). This is so because the interstate element of the offense is included only to provide a basis for federal jurisdiction. As the court explained in *United States* v. *Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971):

> The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. * * * If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied.

In fact, it is not even necessary to show that the defendant knew that the communication he made was interstate in order to prove a violation of 18 U.S.C. 1343. *United States* v. *Blassingame*, *supra*, 427 F.2d at 330–331; see also *United States* v. *Feola*, 420 U.S. 671 (1975).

All Western Union money orders are routed through Middletown, Virginia. Thus petitioner's contention that the transmissions were intrastate (Pet. 5) is incorrect. The fact that the money orders in this case were sent in interstate commerce is no accident, it is a necessary consequence of wiring a money order. Wiring a Western Union money order is, by its nature, an interstate activity. The fact that it would have been possible to wire these money orders intrastate, if Western Union chose to administer its system differently, is immaterial. Sending a Western Union money order is necessarily a wire transmission in interstate commerce and thus is clearly an act within 18 U.S.C. 1343. There was,

in fact, no intrastate method that petitioner could have used to defraud Western Union; the use of Western Union wire transmission, a device necessarily in interstate commerce, was critical to the fraud scheme.

Contrary to petitioner's assertion (Pet. 5–6), the decision in *Wentz* v. *United States*, 244 F.2d 172 (9th Cir. 1957), in no way conflicts with the holding in this case. The question in *Wentz* was whether Section 1343 applied to a wire communication that originated in California, passed through Texas and had as its ultimate destination Mexico City. Although the statute in effect at the time did not include "foreign communications or transmissions," the court found that an "interstate transmission" had taken place when the telegram was sent first from Los Angeles to Dallas, where it was reduced to tangible form and transmitted again. Another wholly intrastate transmission took place in that case, from Dallas to San Antonio, but that transmission was not relevant to the court's decision. There was no transmission in *Wentz* that travelled without interruption from a point in one state, through another, and back to a point within the first state. Thus the court had no occasion to address the question whether the type of communication that occurred here was an "interstate transmission."[1] If anything, *Wentz* supports the decision of the court of appeals in this case, because the court there rejected the defendant's argument that

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[1] Moreover, the *Wentz* court was interpreting 18 U.S.C. 1343 prior to the 1956 amendments, which, as the court recognized (244 F.2d at 175), effected a change in the jurisdictional coverage of the statute. The statute interpreted in *Wentz* used the phrase "interstate transmission" which is taken from the Communications Act of 1934. The statute now refers to a wire transmission "in interstate * * * commerce," a phrase which has always been broadly construed as a basis for the federal jurisdiction. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256–257 (1964).

only the origination and destination, not intermediate points, were relevant. The court suggested that it would have reached a different result had the transmission gone directly from California to Mexico, instead of by way of Texas (244 F.2d at 175).

2. Petitioner also contends (Pet. 5-9) that the interstate transmission "in no way furthered the execution of the scheme to defraud" (Pet. 5). It is, of course, true that in order for petitioner's conduct to fall within the proscription of the statute, the transmission must be "for the purpose of executing" the fraudulent scheme. The use of the wires must be closely enough related to petitioner's scheme to further or contribute to the success of the scheme. See *United States* v. *Maze*, 414 U.S. 395 (1974).[2]

Petitioner argues that the interstate routing of the messages here did not further the execution of the fraud. This argument confuses the jurisdictional requirement of the statute with the substantive elements. The cases cited by petitioner do not support his position, for in those cases there was no doubt that the communication itself was in interstate commerce; the prosecutions failed because of lack of nexus between the communication and the fraudulent scheme. In *United States* v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977), a copy of a packing slip was mailed in interstate commerce. The court held that the mail fraud statute was not violated because mailing the packing slip copy was wholly unrelated to the fraud and, in fact, threatened its success. *Id.* at 473. Similarly, in *Kann* v. *United States*, 323 U.S. 88 (1944), and *United States* v. *Maze*, *supra*,

[2]Section 1343 is quite similar to 18 U.S.C. 1341, the mail fraud statute, and appears to have been patterned after it. Consequently, the courts have often looked to Section 1341 for guidance in construing Section 1343. *United States* v. *Louderman*, 576 F.2d 1383, 1387 & n.3 (9th Cir.), cert. denied, No. 78-5084 (October 10, 1978); *United States* v. *Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976).

the mails were not used until after the consummation of the fraud. In *Parr* v. *United States*, 363 U.S. 370, 390 (1960), the Court ruled that the mailings were not related to the fraud.

In contrast, there can be no doubt that the wire transmissions here were an integral part of petitioner's scheme. As the court of appeals correctly found (Pet. App. A3), without the use of wires, petitioner would not have received the money that he made use of at Western Union's expense. The 7-10 day grace period did not become operative until a wire transmission was sent. The fact that a wholly intrastate transmission would have served petitioner's purposes just as well as the interstate transmissions that actually took place does not diminish the importance to his scheme of the use of wire transmissions. The interstate character of the communications may have been incidental to petitioner's fraud, but the communications themselves—which were of necessity interstate because of Western Union's practices—were at the very foundation of the scheme.[3] *United States* v. *Jackson*, *supra*, 451 F.2d at 284.

In sum, all essential elements of a wire fraud offense were established in this case. A scheme to defraud was proven, the use of the wires was essential to the scheme, and the transmissions were sent interstate.

[3]Petitioner claims (Pet. 7) that the court of appeals found the interstate component of the wire transmissions essential to the fraudulent scheme because petitioner relied on the delay involved in the extra routing of the messages. This reasoning is erroneous, he argues, because there was in fact no delay occasioned by the routing of the transmissions through Virginia. Petitioner misreads the court of appeals' opinion. The court specifically noted that petitioner did not need the transmissions to be interstate in order for his scheme to succeed (Pet. App. A3). But the court held that the delay triggered by the wire transmissions, though not by their interstate character, was critical to the fraud. Because the money orders were in fact sent interstate, the court concluded that "at the heart of [petitioner's] scheme lie interstate transmissions" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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